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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 344.

CONTINENTAL DISTILLING CORPORATION,
Petitioner,
VS.

THE CONNECTICUT IMPORTING COMPANY,
Respondent.

**REPLY BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI.**

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TABLE OF CASES CITED:

<i>Connecticut Importing Co. v. Frankfort Distilleries, Inc.</i> , 101 F. (2) 79	3
<i>U. S. v. Kissel</i> , 218 U. S. 601	3, 4
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The petitioner specified as one of the errors to be urged that the Circuit Court of Appeals erred in sustaining the Trial Court in ruling that the jury might find that a conspiracy, once established, continues indefinitely even though there be no proof of overt acts, continuous cooperation, or concert of action upon the part of the alleged conspirators during the intervening period (Petition, p. 10). It urged as a reason for granting this writ that the question presented was of general importance, that the holding of the Circuit Court of Appeals so far sanctioned a departure by the Trial Court from the usual course of proceedings as to call for the exercise of this Court's supervision, and further, that the holding involved an interpretation of a federal statute in apparent conflict with the applicable decisions of this Court and of a prior decision of the Circuit Court of Appeals for the Second Circuit (Petition, pp. 27, *et seq.*).

The Respondent in its brief maintains that the question presented appears to be of no general importance (Respondent's Brief, p. 15), and suggests that as the question of the right of the plaintiff to recover damages by the institution of another action upon the theory of a continuing conspiracy was not before either the District Court or the Circuit Court of Appeals, it will not be considered by this Court (Respondent's Brief, pp. 18, 19).

This question was clearly presented both to the Trial Court and the Circuit Court of Appeals. (See Brief for Appellant filed with the Circuit Court of Appeals, pp. 21 to 29 inc.).

A.

The right of one claimed to have been injured by a violation of the Sherman Act, to recover damages in successive actions predicated upon the theory of a continuing conspiracy, without being required to show continuous cooperation upon the part of the alleged conspirators, presents an important question of Federal law which should be settled by this Court.

Since the filing of the petition herein, Respondent has instituted another suit against the Petitioner, seeking therein to recover damages in the amount of \$90,000 claimed to have been sustained in the period between the date of the filing of the complaint in the action involved herein and the date of the second suit. The cause of action alleged therein is framed upon the theory of a continuing conspiracy. The summons was issued by the Clerk of the United States District Court for the District of Connecticut on August 25, 1942, the same being Civil Action No. 843.

The complaint in the second action is identical with the complaint appearing in the record herein except for the inclusion of one additional paragraph covering the allegation of a continuing conspiracy, viz. Paragraph 21:

"The defendants have continued said unlawful conspiracy and combination from April 12, 1939 to the present time during all of which time the defendants have refused to supply the plaintiff with their products which refusal is and has been a direct result of the combination and conspiracy set forth in Paragraphs One to Nineteen hereof."

Obviously it is Respondent's position that a conspiracy, once established under the Sherman Act, may be found to continue indefinitely without proof of continuous co-operation upon the part of the alleged conspirators and without proof that it has been kept alive during the intervening period. Possible support for this claim may be found in the Opinion of the Circuit Court of Appeals. Thus, (p. 525):

"The wrong the plaintiff suffered occurred when it was excluded as a distributor. Any continuance of the conspiracy beyond that period could have no effect on its right to damages after Continental had once terminated its agency with the joint action of the other defendants."

It is submitted that this principle is in apparent conflict with the prior opinion of the same Court, in the case of *Connecticut Importing Co. v. Frankfort Distilleries, Inc.*, 101 F. (2) 79, 81, and is also in apparent conflict with the applicable decisions of this Court in *U. S. v. Kissel*, 218 U. S. 601, 607, 8, and *U. S. v. Socony Vacuum Oil Co.*, 310 U. S. 150, 253.

In the *Socony Vacuum* case, this Court held that there must be evidence in the case to show that the conspiracy had "been kept alive", and reached the conclusion that that requirement had been satisfied in that case by evidence of the making, during the time while the conspiracy was claimed to be in operation, of sales to jobbers and consumers at enhanced prices because (p. 253) the "*making of those sales supplied part of the 'continuous cooperation' necessary to keep the conspiracy alive.*" See *U. S. v. Kissel*, 218 U. S. 601, 607." (Italics ours.)

Whether or not one claimed to have been injured by a violation of the Sherman Act can continue to recover damages indefinitely upon the theory of a continuing conspiracy without being required to prove continuous cooperation upon the part of the alleged conspirators or that the conspiracy has been kept alive during the intervening period, presents an important question of public interest involving the correct interpretation to be accorded to the provisions of that Act and the rights of parties claimed to have been injured by its violation to recover damages thereunder.

Dated at Stamford, Connecticut, this 30th day of September, 1942.

Respectfully submitted,

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